



The Wait Is Over

DOL Proposes New Rules for White-Collar Overtime Exemption

By: William Dunham

Early last year, President Obama directed the Department of Labor (DOL) to update the rules governing which white-collar workers qualify as exempt from federal minimum wage and overtime laws. Employers have since been waiting for the other shoe to drop, anticipating further restrictions on their ability to classify workers as exempt. On June 30, 2015, the DOL released its **proposed update** to the white-collar exemption rules. The new rules would redraw the line between exempt and non-exempt white-collar employees, most notably by eliminating the white-collar exemption for employees making less than \$50,000.

The White-Collar Exemption

An employer must satisfy three tests before classifying a white-collar employee as exempt from minimum wage and overtime requirements. First, the employee must earn a predetermined and fixed salary that does not vary based on the quantity or quality of work. Second, that salary must exceed a minimum level set by the DOL. Third, the employee must primarily perform certain executive, administrative, or professional duties. These standards are known as the "salary basis test," the "salary level test," and the "duties test." A less-stringent duties test applies for "highly-compensated" employees.

New Rules for the Salary Level Test

The DOL's proposed regulations target the salary level test. Under the current rule, an employee must be paid a salary of at least \$455 per week (\$23,660 per year) to qualify as exempt. As the DOL notes in its proposal, this number has been updated seven times since 1938, most recently in 2004. The proposed rules would update the salary level test again, this time pegging it at the 40th percentile of weekly earnings for full-time salaried workers. Based on 2013 data from the Bureau of Labor Statistics, this would be \$921 per week (\$47,892 per year). By the time the final regulations go into effect, however, the DOL estimates this figure could rise as high as \$970 per week (\$50,440 per year). The DOL is considering whether to permit nondiscretionary bonuses and incentive payments to count toward these totals.

The proposed rules would make a similar change to the exemption for highly-compensated employees. To meet that exemption, an employee's compensation must currently be \$100,000



or higher and the employee must perform at least one qualifying executive, administrative, or professional duty. The proposed rules would peg the compensation level for a highly-compensated employee to the 90th percentile of full-time salaried workers' earnings, which was \$122,148 as of 2013.

Finally, the DOL proposes recalculating these levels annually in order to keep them relevant. After examining a range of possible approaches to this recalculation, the DOL has offered two methodologies for public comment. The "fixed percentile" approach would peg the exemption levels to the 40th and 90th percentile of weekly earnings of salaried workers, readjusting each year as earnings fluctuate. The "CPI-U" approach would adjust the exemption levels yearly to track the consumer price index for all urban consumers.

Changes to the Duties Test?

The DOL sees the salary level test as "a bright-line for ensuring that employees entitled to the Act's overtime provisions are not exempted." Accordingly, while acknowledging that it is necessary to examine duties "in conjunction with the salary requirement to correctly identify exempt [white-collar] employees," the DOL's proposal does not include any changes to the current duties test. The DOL says that the salary level increase "will address most of the concerns relating to the application of the [white-collar] exemption." This may be a surprise to many who were watching the issue closely, and the DOL's proposal does leave flexibility for last-minute changes to the duties test in the final regulations. While declining to propose any specific updates, the proposal does solicit comments from employers and employees on whether adjustments to the duties test are needed.

What Comes Next

Once the DOL's proposal is formally published, a 60-day public comment period will begin. Employers can offer their thoughts at <http://www.regulations.gov>. While a final rule is not likely until mid-2016, employers with exempt employees making less than \$50,000 should begin planning now. One way or another, the white-collar exemption will be narrowing, and employers can use this change as an opportunity to make sure that all of their employee classifications are in compliance. Locke Lord will keep you updated as the rules develop.

For more information on the matters discussed in this Locke Lord QuickStudy, please contact the author:

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